# No. 21,936

IN THE

# United States Court of Appeals

## For the Ninth Circuit

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NATIONAL LABOR RELATIONS BOARD,
*Petitioner,*

vs.

CONSTRUCTION & GENERAL LABORERS' UNION LOCAL 270, INTERNATIONAL HOD CARRIERS, BUILDING AND COMMON LABORERS' UNION OF AMERICA,
*Respondent.*

**On Petition for Enforcement of an Order of the National Labor Relations Board**

## BRIEF FOR RESPONDENT CONSTRUCTION & GENERAL LABORERS' UNION LOCAL 270, INTERNATIONAL HOD CARRIERS, BUILDING AND COMMON LABORERS' UNION OF AMERICA

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LEVY, DEROY, GEFFNER & VAN BOURG,
45 Polk Street, San Francisco, California 94102,
*Attorneys for Respondent.*



PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

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### STATEMENT OF THE CASE

The complaint filed by the National Labor Relations Board against the Respondent charged a violation of Section 8(b)(4)(i) and (ii)(B) and Section 2(6) and (7) of the Labor Management Relations Act of 1947, as amended (29 U.S.C., Sec. 151). The basic

facts involve a general contractor (Howard J. White, Inc.) who was performing work in the construction industry on a construction jobsite known as the McCullough location. White was signatory to collective bargaining agreements (Respondent's Exhibits 1 and 2) with the Respondent Union. White engaged the services of Hans Eggli, landscaping subcontractor, to perform some of the work at the above-mentioned jobsite. The work to be performed by the subcontractor was work which was mentioned in and covered by the collective bargaining agreements between White and the Union.

Eggli commenced work in April of 1965 and ended in May of 1965 (R.Tr. pp. 87, 92, 151).

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## THE ISSUES

1. There were no unlawful threats against, or coercion or restraint of White.

2. There were no threats or other unlawful actions against White in violation of Section 8(b)(4).

3. There was no violation of the provisions of Section 8(b)(4) with respect to the subcontractor B & C Company.

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## ARGUMENT

### THERE WERE NO UNLAWFUL THREATS AGAINST, OR COERCION OR RESTAINT OF WHITE.

The record is clear that no unlawful threats, coercion or restraint occurred with respect to White. Gregory Aguilar testified that he was the assistant

business representative of the Union and, in the course of a routine check of the construction jobsite on the Stanford University campus, he noticed a man doing laborers' work. He went over to the man (Ramirez), questioned him, and determined that he was working for Eggli and did not belong to the Union. Aguilar talked about substandard wages and conditions under which Ramirez was working, but such a conversion is, of course, lawful (R.Tr. pp. 36, 95, 96 and 97). The National Labor Relations Board made absolutely no determination concerning the significance of this conversation.

Aguilar returned to the job in the afternoon and talked to White's superintendent. He asked the superintendent if he knew that Eggli was a non-union contractor. Aguilar further explained that the use of a non-union subcontractor was a violation of that portion of the collective bargaining agreement which deals with the subcontracting out of work covered by the agreement under substandard conditions. The section involved is Section 11 of Respondent's Exhibit 2, which provides:

> Section 11—*Subcontractors*
>
> The terms and conditions of this Agreement insofar as it affects Employer and the Individual Employer shall apply equally to any subcontractor under the control of, or working under contract with such Individual Employer on any work covered by this Agreement, and said subcontractor with respect to such work shall be considered the same as an Individual Employer covered hereby.

If an Individual Employer shall subcontract work herein defined, such subcontract shall state that such subcontractor agrees to be bound by and comply with the terms and provisions of this Agreement.

A subcontractor is defined as any person, firm or corporation who agrees under contract with the Employer, or any Individual Employer, or a subcontractor of the Employer, or any Individual Employer to perform on the job site any part or portion of the construction work covered by the prime contract, including the operation of equipment, performance of labor and installation of materials.

An Individual Employer who provides in the subcontract that the subcontractor will pay the wages and benefits and will observe the hours and all other terms and conditions of this Agreement, shall not be liable for any delinquency by such subcontractor in the payment of any wages or fringe benefits provided herein, including payments required by Sections 28(A), 28(B) and 28(C), except as follows:

The Individual Employer will give written notice to the Union of any subcontract involving the performance of work covered by this Agreement within five (5) days of entering such subcontract, and shall specify the name and address of the subcontractor.

If thereafter such subcontractor shall become delinquent in the payment of any wages or benefits as above specified, the Union shall promptly give written notice thereof to the Individual Employer and to the subcontractor specifying the nature and amount of such delinquency.

> If such notice is given, the Individual Employer shall pay and satisfy the amount of any such delinquency by such subcontractor occurring within sixty (60) days prior to the receipt of said notice from the Union, and said Individual Employer may withhold the amount claimed to be delinquent out of the sums due and owing by the Individual Employer to such subcontractor.
>
> The Individual Employer shall not be liable for any such delinquency if the Local Union where the delinquency occurs refers any employee to such subcontractor after giving such notice and during the continuance of such delinquency.
>
> The Individual Employer shall not be liable for any such delinquency occurring more than sixty (60) days prior to receipt of written notice from the Union.

(See, also, R.Tr. pp. 98, 99 and 117). Nothing about this conversation can be deemed to have been unlawful.

Because of the apparent violation of the colletive bargaining agreement, Aguilar asked White's superintendent if some sort of a meeting could be arranged with Eggli. At this time almost no work was left to be done on the job by Eggli, but Aguilar did not want violations of Section 11 to occur in the future. White's superintendent agreed to arrange for a meeting. When Aguilar did not receive a call from White's superintendent, he went out on the job again and saw another man doing laborers' work (Clement), and asked White's superintendent about Clement. White's superintendent simply advised Aguilar that

nothing could be done about Eggli, and the conversation about Clement seems to be unclear. Aguilar then spoke to Clement and determined that he worked for another subcontractor who apparently did have a collective bargaining agreement with the Union (Clement was working for B & C Company).

The above-mentioned conversation occurred in early April. Nothing further occurred and there was no interruption of work until approximately April 26, 1965 when Aguilar again came on the jobsite and saw three men doing landscaping work. These three men refused to talk to Aguilar even though the landscaping work was covered by the agreement between the Union and White (R.Tr. p. 106). When Aguilar was unable to determine how the men got on the job and whom they worked for, and therefore could not determine whether other portions of the agreement had been violated (hiring hall provisions contained in Section 3 of Respondent's Exhibit 2), Aguilar attempted to find White's superintendent and spoke to the new superintendent who was unable to give Aguilar any information. No interruption of work occurred and the job was completed without interruption.

It is respectfully submitted that a union business agent has the right and obligation to make inquiries concerning potential violations of a collective bargaining agreement. Such conversations are lawful even if they are less than friendly, particularly in view of the fact that none of the provisions of the collective bargaining agreement were deemed by the National

Labor Relations Board to be unlawful on their face. The Board is not attempting to have any portion of the collective bargaining agreement declared unlawful and therefore it cannot declare conduct of an assistant business agent of a union unlawful when he seeks to enforce those lawful provisions of the contract or at least to determine by verbal inquiry whether or not they have been violated.

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**THERE WERE NO THREATS OR OTHER UNLAWFUL ACTIONS AGAINST WHITE IN VIOLATION OF SECTION 8(b)(4).**

Section 11 of the collective bargaining agreement referred to previously in this brief is a lawful collective bargaining clause dealing with subcontracting in the construction industry pursuant to the provisions of Section 8(e) of the Act. Any discusssions between Aguilar and White's superintendent concerning real, imagined, or potential violations of this section of the agreement would revolve, therefore, around a *primary* dispute between the Union and White as the signatory employer to the collective bargaining agreement. That is, the Union has a right to talk directly to the employer concerning that employer's violation of the collective bargaining agreement and to take steps against that employer to correct a violation. This is a clearcut action by the Union against the primary employer and therefore could not possibly be a violation of the secondary boycott provisions contained in Section 8(b)(4) of the Act.

The Board apparently misconstrued this basic issue. The Board and the General Counsel apparently take the position that discussions between Aguilar and White were improper and unlawful under the concept of "secondary boycott" because those conversations revolved around another employer, namely, Eggli and perhaps B & C. Merely because the names of those employers may have come into the conversation does not change the fact that the Union was interested in determining from White whether White had violated the collective bargaining agreement by virtue of an improper subcontract of work covered by the agreement. Under these circumstances, it is clear that any discussion between White and the Union and any statement of potential conduct by the Union with respect to White in order to vindicate its collective bargaining agreement with White is activity concerning a primary employer and not a secondary employer.

Similarly, a request by the Union directed to White to cease violating a lawful section of the collective bargaining agreement is a lawful request even though it might have the effect of having White cease doing business with Eggli. Nevertheless, such a request is not an unlawful secondary boycott since it is directed to the primary employer's violation of the agreement. Nothing in the statute prohibits such a request directed to a primary employer in the enforcement of a lawful provision of a collective bargaining agreement, even though the request might have some effect with respect to another employer. Such a clause as is con-

tained in Section 11 and the type of request made by Aguilar to White are clearly within the permissible scope of conduct allowed by the Board and the courts with respect to such clauses. See *Orange Belt District Council of Painters, No. 48, etc.,* 131 NLRB 383 (1962), remanded by the United States Court of Appeals for the District of Columbia, 328 F.2d 534 (1964), and supplemented on remand by the Board, 153 NLRB No. 80 (1965); see, also, *Woodwork Manufacturers Ass'n v. NLRB,* 18 L.Ed. 2d 356 (April 17, 1967); and *Insulation Contractors Ass'n v. NLRB,* 18 L.Ed. 2d 389 (April 17, 1967). The United States Supreme Court in the *Woodwork* case, *supra,* found that provisions similar to Section 11 were lawful and the unions in that case did not violate Section 8(e) of the Act by entering into the agreement or by enforcing its terms, even though such enforcement affected manufacturers and employers other than the primary construction contractor. The decision of the Board in the *Orange Belt* case, *supra,* is specifically contrary to the Board's finding in the instant case. In that case the Board held:

> "'The test as to the "primary" nature of a subcontractor clause in an agreement with a general contractor has been phrased by scholars as to whether it "will directly benefit employees covered thereby," and "seeks to protect the wages and job opportunities of the employees covered by the contract." We have phrased the test as whether the clauses are "germane to the economic integrity of the principal work unit," and seek "to protect and preserve the work and standards

[the union] has bargained for," or instead "extend beyond the [the contracting] employer and are aimed really at the union's difference with another employer."' "

In *Meat and Highway Drivers Local 710 v. NLRB,* 335 F.2d 709 (C.A., D.C., 1964), the Court held:

> "Resolution of the difficult issue of primary versus secondary activity, as it relates to this case, involves consideration of two factors: (1) jobs fairly claimable by the bargaining unit, (2) preservation of those jobs for the bargaining unit. If the jobs are fairly claimable by the unit, they may, without violating either Section 8(e) or Section 8(b)(4)(A) or (B), be protected by provision for, and implementation of, no subcontracting or union standards clauses in the bargaining agreements. Activity and agreement which directly protect fairly claimable jobs are primary under the Act."
>
> [at pp. 713-714]

Since the provisions of Section 11 of the agreement involved in this case are lawful on their face and no contention is made that they are unlawful, it would seem evident that discussions seeking to enforce the clause cannot be deemed unlawful.

The proviso of Section 8(e) of the Act very clearly states that nothing in that section

> "shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of construction . . ."

It is obvious that the work involved here was at the site of construction and that both the Union and White are in the construction industry. It is further clear that both Eggli and B & C were subcontractors in the construction industry. Under these circumstances it is plain that Section 11 is a clause permitted by this proviso, and its enforcement or discussions concerning its violation cannot be construed as unlawful secondary activity even though they might involve an effect upon Eggli and/or B & C.

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**THERE WAS NO VIOLATION OF THE PROVISIONS OF SECTION 8(b)(4) WITH RESPECT TO B & C.**

This point need not be labored. Clement was the son of the owner of B & C and, contrary to the findings of the Board, he testified that he was the working foreman at the McCullough site with power to hire and fire and authority to contact the Union hiring hall. Clement further testified that he had no idea concerning the contents of the job when he left nor could he elucidate on whether or not there was an agreement between Eggli and B & C (which apparently was an oral agreement with unspecific terms) (R.Tr. pp. 21-23 and 29-30). Thus discussions with him were discussions with a manager and not a worker or employee and the discussions with him clearly did fall within the proper request or discussion or course of conduct permitted by the decision of the United States Supreme Court in *NLRB v. Servette, Inc.*, 377 U.S. 46 (1964).

## CONCLUSION

Under the circumstances described above, and for the reasons argued in this brief, it is respectfully submitted that the Board's petition be denied and that the order not be enforced.

Dated, San Francisco, California,
January 15, 1968.

LEVY, DEROY, GEFFNER & VAN BOURG,
By VICTOR J. VAN BOURG,
*Attorneys for Respondent.*

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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

VICTOR J. VAN BOURG,
*Attorney for Respondent.*